STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 11, 2003
v HECTOR M. OLIVO, Defendant-Appellant.	No. 240362 Wayne Circuit Court LC No. 01-004452

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v HECTOR OLIVO, Defendant-Appellant.	No. 243621 Wayne Circuit Court LC No. 01-004451-02

Before: Cavanagh, P.J., and Jansen and O'Connell, JJ.

PER CURIAM.

Following a joint bench trial, defendant-appellant Hector Olivo (defendant), and codefendant Jhamin Ledesma (Ledesma), were each convicted of possession of a loaded firearm in a motor vehicle, MCL 750.227c. Defendant was also convicted of first-degree home invasion, MCL 750.110a(2), while Ledesma was acquitted of this charge. Defendant was sentenced to concurrent prison terms of ten to twenty years for the first-degree home invasion conviction and seventeen to twenty-four months for the possession of a loaded firearm conviction. He now appeals each of his convictions as of right. We conditionally affirm defendant's convictions and remand for further proceedings.

Defendant was charged with a series of offenses in two separate cases that were consolidated for purposes of trial. Although defendant has filed separate appeal briefs in each of the two cases, the briefs raise questions that pertain to both convictions. We find merit to

defendant's claim concerning defense counsel's acquiescence to the trial court's determination at the pretrial *Walker*[1] hearing that it was not required to decide the voluntariness of defendant's statement to police officers on March 30, 2001, where defendant denied making the statement. Defense counsel's acquiescence to this determination constituted a waiver of the voluntariness issue, *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000), thus limiting our review to the question whether defense counsel was ineffective.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *Id*. at 579. The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id*. To establish ineffective assistance of counsel, defendant must show "that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000) citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

It is apparent from the record that defense counsel was operating under an erroneous view of the law when he stated at the *Walker* hearing that it was not necessary for the trial court to decide the voluntariness of defendant's statement. Although defendant claimed that the police fabricated the statement attributed to him, he admitted signing the statement, but claimed he did so involuntarily. Both defense counsel and the trial court were mistaken in their belief that it was not necessary to decide the question of voluntariness under these circumstances. *People v Neal*, 182 Mich App 368, 372; 451 NW2d 639 (1990). We therefore conclude that defense counsel's performance at the *Walker* hearing fell below an objective standard of reasonableness. *Toma, supra* at 302; *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999).

Nevertheless, to succeed on a claim of ineffective assistance of counsel, defendant was also required to establish a reasonable probability that, but for defense counsel's error, the result of the proceeding would have been different. *Toma, supra* at 302-303. Because defendant did not raise the issue of ineffective assistance of counsel in the trial court, our review is limited to the facts of record. *Avant, supra* at 507.

We disagree with the prosecution's position on appeal that it is evident from the record that defendant was not prejudiced by the admission of his March 30, 2001 statement at trial. Whether defendant can establish the requisite prejudice hinges on two issues: (1) whether a reasonable probability exists that defendant would have been acquitted of the two offenses of which he was convicted if his March 30, 2001, statement was excluded; and, (2) if so, whether a reasonable probability exists that the trial court would have excluded defendant's March 30, 2001, statement if it had ruled on the voluntariness issue at the *Walker* hearing.

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[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

Unlike a jury trial, our review of a verdict at a bench trial is aided by the trial court's duty to find facts specifically and state its conclusions of law. MCR 6.403; *People v Edwards*, 171 Mich App 613, 619; 431 NW2d 83 (1988). In the case at bar, the record reflects that neither defendant nor codefendant Ledesma testified at the bench trial. Further, the trial court specifically relied on defendant's incriminating statement to establish his identification as one of the perpetrators for the first-degree home invasion offense. Without similar evidence for codefendant Ledesma, the trial court found Ledesma not guilty of that offense. Thus, with regard to defendant's first-degree home invasion conviction, the record establishes a reasonable probability that the result of the trial would have been different if defendant's March 30, 2001, statement was excluded.

Accordingly, we must determine whether there is a reasonable probability that the trial court would have excluded defendant's March 30, 2001, statement if it had addressed the voluntariness issue at the *Walker* hearing. In considering this issue, we reject defense counsel's claim that it would have been clear error for the trial court to find that defendant voluntarily signed and initialed the March 30, 2001, statement. Voluntariness depends on the absence of police coercion. *People v Daoud*, 462 Mich 621, 635; 614 NW2d 152 (2000). Although an appellate court reviews a trial court's determination of voluntariness independent of a trial court, deference is given to the trial court's assessment of the weight of evidence and the credibility of witnesses. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000); *People v Howard*, 226 Mich App 528; 543; 575 NW2d 16 (1997).

In the present case, it is apparent that the question whether defendant voluntarily signed and initialed the March 30, 2001, statement depends on the credibility of defendant's testimony at the *Walker* hearing, wherein he claimed that he signed and initialed the statement only because he was hit by police officers. Because the trial court is in a superior position to observe and determine the credibility of witnesses, and because the trial court failed to decide this necessary issue, we conclude that the record is insufficient to determine whether defendant voluntarily signed the March 30, 2001, statement, or whether defendant has established the requisite prejudice to succeed on a claim of ineffective assistance of counsel.

Given that the circumstances under which defendant signed and initialed his police statement was a disputed factual issue, which the trial court failed to decide, we conclude that it is appropriate to remand this case to the trial court for further proceedings relative to the prejudice element of defendant's ineffective assistance of counsel claim. *People v McMillan*, 213 Mich App 134, 141-142; 539 NW2d 553 (1995). Therefore, pursuant to our authority to grant relief as the case may require, MCR 7.216(A)(7), we remand this case in order for the trial court to decide whether defendant voluntarily signed and initialed the March 30, 2001, statement. If the trial court determines that defendant's actions were voluntary, his convictions shall be affirmed because defendant would not have been prejudiced by defense counsel's acquiescence in the trial court's failure to decide this issue. If the trial court determines that defendant was improperly coerced by the police into signing the statement, the trial court shall issue supplemental findings of fact and conclusions of law regarding whether the prosecution sufficiently proved the first-degree home invasion and possession of a loaded firearm in a motor vehicle offenses absent the March 30, 2001, statement. See *People v Whitfield*, 214 Mich App 348, 354; 543 NW2d 347 (1995) (the remedy for an ineffective assistance of counsel injury may be tailored to the circumstances).

Defendant's remaining issues on appeal do not warrant relief. We are not persuaded that defendant has shown an independent basis for relief due to ineffective assistance of counsel. *Toma, supra* at 302-303; *Avant, supra* at 506-507. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey,* 237 Mich App 74, 76; 601 NW2d 887 (1999). Further, defense counsel's alleged concession regarding the first-degree home invasion charge, examined in context, did not fall below an objective standard of reasonableness. *People v Krysztopaniec,* 170 Mich App 588, 596; 429 NW2d 828 (1988). Moreover, even if defense counsel's conduct could be considered unsound, defendant has not established record support for his claim of prejudice in light of the factual findings made by the trial court. *Toma, supra* at 303; see also *Edwards, supra* at 619.

Nor is it apparent from the record that defense counsel's failure to object to the use of a photographic lineup constituted deficient performance. See *People v Anderson,* 389 Mich 155, 186-187 n 22; 205 NW2d 461 (1973); *People v Kelly,* 231 Mich App 627, 634; 588 NW2d 480 (1998). Defendant's mere speculation that a police investigator gave incredible testimony at the *Walker* hearing regarding why a photographic lineup was conducted in lieu of a live lineup affords no basis for relief. *Avant, supra* at 508.

Defendant's claim in his standard 11 brief that defense counsel's performance was affected by alleged funding deficiencies is not supported by the record, nor has defendant established that a remand is warranted for further proceedings concerning this issue. *Toma, supra*; *Avant, supra.* Further, defendant has not established either deficient performance on the part of defense counsel or clear error by the trial court relative to his waiver of his right to a jury trial. MCR 6.402(B); *People v Shields,* 200 Mich App 554, 560-561; 504 NW2d 711 (1993); *People v James (After Remand),* 192 Mich App 568; 481 NW2d 715 (1992). Defendant's proposed colloquial is not constitutionally required. *United States v Sammons,* 918 F2d 592, 596-597 (CA 6, 1990).

None of the issues raised in appellate counsel's appeal brief filed in Docket No. 240362 were raised in the trial court and, therefore, are not preserved. Accordingly, we review these issues only for plain error affecting defendant's substantial rights. *People v Carines,* 460 Mich 750, 763-765; 597 NW2d 130 (1999).

First, defendant has not shown that the prosecutor's charging decision operated to deprive him of due process. *People v Conat,* 238 Mich App 134, 148; 605 NW2d 49 (1999). Generally, a prosecutor has broad discretion in charging defendants. *People v Herndon,* 246 Mich App 371, 391; 633 NW2d 376 (2001). Having failed to show any conviction for which the evidence was insufficient, we find no due process violation. *People v Lemmon,* 456 Mich 625, 633-634; 576 NW2d 129 (1998); see also *People v Graves,* 458 Mich 476; 581 NW2d 229 (1998); *Edwards, supra.* As such, there was no plain due process error affecting defendant's substantial rights. *Carines, supra* at 763.

Second, defendant has not shown that he requested a copy of the video recording of codefendant Ledesma in the police vehicle, or that this evidence was material to a determination of his own guilt or innocence. Thus, a plain violation of *Brady v Maryland,* 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), has not been established. See *Carines, supra* at 763.

Third, defendant has not established support for his claim that the "co-mingling" of trial evidence deprived him of due process. Substantively, defendant presents only an evidentiary challenge to the admission of a police officer's testimony about statements made by codefendant Ledesma. MRE 401 and MRE 403. But evidence may be admissible as to only one party or purpose. MRE 105. It is not apparent from the record that the trial court considered Ledesma's statements against defendant. On the contrary, the record indicates that the trial court understood that statements made by one defendant would not be admissible against the other. A judge sitting as the trier of fact is less likely to be deflected from the fact-finding task by prejudicial considerations that a jury would find compelling. *Edwards, supra* at 619. There is nothing in the record to indicate that the trial court considered Ledesma's statements in finding defendant guilty of the two offenses. Defendant has not established a plain error.

Defendant's convictions are conditionally affirmed, and the case is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Peter D. O'Connell